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NO. 79-2063

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

W. L. McIlroy and James Dunlavey, As Executor of The Estate of Grady R. McIlroy ..... *Petitioners*

vs.

State of Arkansas, Ozark Society, and Wayfarer Expeditions, Inc. ..... *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

RESPONDENT, OZARK SOCIETY, BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether or not the alleged federal question was properly raised in the State court proceedings.
2. Whether or not in our federal system the federal government may determine for each state which of its waters are to be deemed public (navigable) and which of its waters are to be deemed private (nonnavigable).
3. Whether or not the United States Supreme Court ought to become involved in the interpretation and/or development of common law by a particular state's highest tribunal when there is clear and settled precedent supporting a particular ruling among the several states.

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RESPONDENT, OZARK SOCIETY, BRIEF IN OPPOSITION

The respondent Ozark Society respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Arkansas Supreme Court. The opinion is reported at 268 Ark. 227, 595 SW2d 659.

STATEMENT OF THE CASE

The proceeding in the Arkansas Court ultimately involved a delineation of public and private rights in and to a segment of the Mulberry River, a scenic and popular

canoeing stream in northwest Arkansas. Petitioners own property through which the Mulberry River flows, and on June 15, 1978 filed a Petition for Declaratory Judgment in the Franklin County Chancery Court requesting that the court declare the Mulberry nonnavigable at the point where it transects petitioners' property and that the public be prohibited from boating through petitioners' property.

Defendants set forth in petitioners' petition were the Ozark Society, Wayfarer Expeditions, Inc., and The Wilderness Company. The Ozark Society is a nonprofit regional conservation organization. As part of its educational program the Ozark Society published in 1974 a canoeing guide to the Mulberry River, titled "The Mighty Mulberry," and petitioners claimed that publication and dissemination of the canoeing guide had caused trespass on and through their property.

Defendant Wayfarer Expeditions, Inc., is a private corporation engaged in the rental of canoes and other float equipment. The Defendant Wilderness Company did not file a response.

The State of Arkansas through the office of the Attorney General intervened on the grounds that a declaration of nonnavigability would divest the state of title to the stream bed and the right of the public to the use of the waters of the stream could be foreclosed.

The Defendants, Ozark Society, Wayfarer Expeditions, Inc., and the Intervener, State of Arkansas, filed answers and counterclaims alleging that the Mulberry River is a navigable water; that irrespective of whether the state or petitioners held title to the stream bed the public had a usufructuary right to use the waters of the stream; that by

virtue of conditions incorporated in the Act of Congress admitting Arkansas to the Union, the public has the right to use the Mulberry River as a highway; and that the public had acquired a prescriptive easement over the watercourse. In addition, the court was requested to enjoin petitioners from interfering with the lawful use of the stream by the public.

Since the turn of the century the waters of the Mulberry River have been used by individuals for swimming, fishing and boating. Commencing in the 1960's, floating the Mulberry River in canoes became increasingly popular, due to its reputation as one of the finest white water float streams in Arkansas. In 1971, W. L. McIlroy, who owns an undivided one-half interest in the tract in question, returned to Arkansas and became involved in farming operations conducted on the tract owned by petitioners, and between 1971 and the date of the filing of the Petition for Declaratory Judgment numerous confrontations occurred between Mr. McIlroy and canoeists, with Mr. McIlroy claiming that the stream was nonnavigable and private, and canoeists claiming that it was navigable and public.

The pertinent facts as they relate to development of title to the property in question are as follows:

The State of Arkansas was admitted to the Union in 1836 and the land in question was carved out of the Missouri Territory. In 1836, a set forth within the abstract on the property (Defendant Ozark Society Exhibit 1, Sheet 1 a), United States Government surveyors surveyed the property in question and the Mulberry River was set forth as meandered. The initial patent on the property in question was dated November 15, 1854 (Defendant Ozark Society

Exhibit 1, Sheet 6) and subsequent to that date petitioners acquired title to the property. Until the conclusion of this lawsuit there has never been a determination made by any court or the Arkansas legislature as to whether or not the waters of the Mulberry River are navigable or nonnavigable. There are numerous Arkansas Supreme Court decisions and Arkansas legislative pronouncements that relate to the navigability or nonnavigability of other watercourses.

The trial court concluded that the Mulberry River is not a navigable stream; that the federal Act of Admission of Arkansas to the Union did not obtain the reservation of rights to nonnavigable waters; that by virtue of the Mulberry River being deemed a nonnavigable stream petitioners own the stream bed where the waters flow through their property; and that petitioners have the right to prevent trespass thereon in that the Statute of Limitations had not run with regard to the acquisition of a prescriptive easement of the public.

The respondents *did not,* as stated in petitioners' Statement of the Case, concede at either the trial or appellate level that "the test for navigability under Arkansas law had always been whether the stream is capable of use commercially." (Pet. P. 6) See Appendix "A" hereto.

The State of Arkansas, the Ozark Society and Wayfarer Expeditions, Inc., appealed on the grounds that the Chancellor erred in determining the Mulberry River to be nonnavigable and/or in failing to find the existence of a public or prescriptive easement.

The Arkansas Supreme Court determined that the Mulberry River was navigable and reversed the trial court's decree in that regard and did not discuss or consider any of the other issues raised on appeal.

JURISDICTION

The Supreme Court lacks jurisdiction to review this cause, as the constitutional right claimed by the petitioners was not appropriately set up or claimed as required by 28 U.S.C. §1257(3). None of the pleadings of the petitioners, including the Petition for Declaratory Judgment and the Replies to Counterclaims filed by the respondents herein, set up or claimed a federal constitutional right to the stream bed and/or waterway which would have put into issue the federal due process question (R. 1, 40, 67 and 81). See Appendix "B". It is well settled in Arkansas that a reviewing court will not reach a constitutional issue raised for the first time on appeal. *Gross v. Gross,* 585 SW2d 14; *Williams v. Edmondson,* 520 SW2d 260. The majority opinion of the Arkansas Supreme Court in reliance on this rule did not consider the federal constitutional due process claim. The only time the federal constitutional question was raised was within the Petition for Rehearing, and under Arkansas practice it could not be considered. *Arkansas State Highway Commission v. Coffelt,* 522 SW2d 839; *Burks Motor, Inc. v. International Harvester, et al,* 466 SW2d 943. It cannot be heard by this Court as well. *Herndon v. Georgia,* 295 U.S. 441, 443.

Briefs before the State courts are not ordinarily part of any record filed with the Supreme Court and cannot be used to establish that a federal question was raised. *Live Oak Ass'n v. Railroad Comm.,* 269 U.S. 354, 357-358. Even if the Supreme Court were to consider the brief of petitioners as evidence of a claim of a federal right under the United States Constitution, the only reference in petitioners' brief before the Arkansas Court to any constitutional right is a

reference on page 34 of petitioners' brief, to the Arkansas Constitution and "it is well settled in this Court that it must be made to appear that some provision of the Federal, as distinguished from the State, Constitution, was relied upon, and that such provision must be set forth." *New York Central and H. R. Co. v. New York,* 186 U.S. 269, 273.

Although the constitutional issue was raised in the dissenting opinion, it was done so contrary to customary Arkansas practice and the recognition of it in this instance cannot belie the fact that it was simply not properly raised by the petitioners. The Court should defer to the judgment of six of the seven justices of the Arkansas Supreme Court on this state procedural question. It should be assumed that the silence is due to a procedural deficiency, *Bailey v. Anderson,* 326 U.S. 203, 206-207, and this Court is bound by it. *John v. Paullin,* 231 U.S. 583, 585.

The question is one of jurisdiction, and in our federal system the question must have been raised and decided in the state court. *Crowell v. Randell,* 10 Pet. 368, 391; *Cardinale v. Louisiana,* 394 U.S. 437, 438. A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of the police power. *Williams v. Georgia,* 349 U.S. 375, 382-383.

Nor can the petitioners claim surprise in regard to the federal question since petitioners alleged in their Petition for Declaratory Judgment that as owners of the land bordering the Mulberry, a nonnavigable stream, they owned the bed of the stream as well as the water. (R. 4). See Appendix "B". Even if one assumes that all of the pertinent past decisions in Arkansas would call for a non-

navigability determination (which was disputed by respondents at both the trial and appellate level within the briefs and during oral argument), petitioners should have anticipated that there was a distinct possibility that the Arkansas Court would follow the precedent set in other state courts and extend the definition of navigability for state purposes to include recreational streams. The lawsuit as framed by the petitioners put squarely into issue the navigability viz a viz nonnavigability question and any legal consequences allegedly incidental to such a determination would have to be raised at the initiation of the lawsuit and not at this late date.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *The Court lacks jurisdiction to hear this cause. Note the preceding JURISDICTIONAL section.*

2. *The decision is based on an adequate and independent state ground.*

a. The Arkansas Supreme Court applied existing precedent to the question of whether or not recreational use can in and of itself support a navigability determination.

In applying case law to a dispute it should be axiomatic that any appellate court reviewing prior decisions would consider the precise issue that the court was ruling on and distinguish cases from one another based on rules or principles as they relate to a specific issue. It is conceded that there are a number of Arkansas cases which have required historical or prospective commercial use in order to qualify a stream for a navigability determination. However, apart from *Barboro v. Boyle,* 119 Ark. 377, 178 SW 378 (1915), cases cited by the petitioners have not focused on whether or not recreational use of a stream can in and of itself be sufficient to support a finding of navigability. The cases generally deal with who owns the gravel or minerals beneath the stream bed or the extent of ownership of the stream bed or bank by a riparian landowner. *Barboro,* supra, standing alone could have supported a finding of navigability irrespective of other decisions of the Arkansas Court. The case has never been overruled although it has been misinterpreted in *McGahhey v. McCollum, Adm.*, 207 Ark. 180, 179 SW2d 661 (1944), wherein it is stated that the basis for the *Barboro* decision was the susceptibility of Horseshoe Lake to commercial use.

In *Barboro,* the Court indicated that whether or not a

stream can ever be used for the purpose of navigation in a successful venture is not an *exclusive* test of the navigability of the lake. (Emphasis supplied). Although in *Barboro* the Court noted that the testimony did indicate that Horseshoe Lake is susceptible of commercial use, the Court went on to state:

> It is the policy of this state to encourage the use of its watercourses for any useful or beneficial purpose. There may be *other* public uses than the carrying on of commerce of pecuniary value. (Emphasis supplied).

In citing the landmark case of *Lamprey v. State,* 52 Minn. 181, 53 NW 1139 (1893), and quoting from this case "to hand over all these lakes to private ownership, under *any old or narrow test of navigability,* would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated," (emphasis supplied) the Arkansas Court took the initial step in defining navigability to include recreational use only.

Barboro was decided in 1915 and petitioners acquired the property in question in 1967. Any expectation that the law in Arkansas was well settled as to whether or not recreational use of a watercourse could in and of itself support a declaration of navigability is simply refuted by the *Barboro* decision. In addition, the fact that the river was meandered within the government survey would put a prospective purchaser on notice that the watercourse could be considered navigable.

The statement in the majority opinion that it may be that past decisions in Arkansas did or did not anticipate recreational use as a basis for navigability indicates that

the six justices may not have agreed among themselves on this question; however, four justices could have cited *Barboro* as precedent for the holding in the instant case without including language to the effect that the definition of navigability in Arkansas was being redefined.

b. Within Item 2 of Questions Presented, petitioners assume that the title to the stream bed was vested in the riparian. Whether or not the property right claimed by petitioners was vested is properly a question of local law and the United States Supreme Court should defer to the judgment of the Arkansas Court since there is clearly a basis for holding that it was not a vested right.

It is axiomatic that one cannot take what has not been granted. Until the Arkansas Court or the Arkansas legislature has made a specific determination as to whether or not the Mulberry River is or is not navigable, there is no basis for elevating the right claimed by petitioners to a constitutionally protected vested right.

As stated in 16 C.J.S., Constitution Law, Section 215, a vested right "must be absolute, complete, and unconditional, independent of a contingency, and a mere expectancy of future benefit, or a contingent interest in property fouded on *anticipated continuance of existing laws* does not constitute a vested right." (Emphasis supplied).

Had the Arkansas Supreme Court determined that the Mulberry River was a navigable river, this decision would have been tantamount to confirming title to the river in the landowner and at this point the allegedly divested right would have become vested. Had this occurred and had the Arkansas legislature subsequent thereto declared the Mulberry River to be a navigable river, petitioners

would have a basis upon which to claim they possessed a vested right entitled to constitutional protection.

c. Arkansas has adopted the English common law by means of a reception statute. Ark. Stat. Ann. §1-101. Throughout the development of common law, courts have on many occasions drawn on the "animating principles" of a particular rule of law and technically changed the law in order that it conform with the underlying basis for the rule of law. As noted in *Lamprey v. Metcalf*, supra, in England the division of waters into navigable and nonnavigable was but a way of dividing them into public waters and private waters since the principal public use of that time was navigation. The growth and vitality of the common law has been noted by this Court. "It has been said so often as to become axiomatic, that the common law is not immutable but, flexible, and by its own principles adapts itself to varying conditions." *Funk v. United States*, 290 U.S. 371, 383.

The majority of justices could have construed *Barboro* as it was construed in the dissent but nevertheless held that the Mulberry River was navigable since it was clearly considered a public stream by almost everyone except the landowner. In essence what was de facto a pubic stream became de jure a public and not a private stream.

Each state should be given great leeway in developing its common law, particularly when the law in a particular area *i.e.*, water law, has been fashioned to such a large degree by judge-made law which historically has reflected a concern with constitutional restraints attendant to any decision. The question is not whether this Court would have ruled as the majority has but whether or not it is clear within the context of a difficult and important state

public policy determination a properly raised constitutional right has been violated.

3. *It is well settled that each state is free to define navigability thereby allocating public and private rights in watercourses within the state.*

Since *Hardin v. Jordan,* 140 U.S. 371, it has been clear that the states have the power to determine as a matter of local law the question of what waters are navigable. Uniformity is certainly desirable when setting limits within which a navigable servitude may be obtained by the federal government without compensation (note discussion within succeeding Section 4); however, under our federal system the navigability question at the state level ought not be constrained by the federal government. The issues are different, as a state is dealing with intrastate waters and determining not singularly whether they should be open to the public as a commercial transportation network, but whether or not the fee simple title to them ought or ought not be retained in the public domain and/or if it is to be granted what usufructuary rights should be retained in the public.

As the states are free to determine which waters are public and which are private, subject to federal use, regulation and control, so too the riparian patentee takes subject to the power of the state to construe the patent in the interest of its total citizenry. *Barney v. Koekuk,* 94 U.S. 324. For ownership and interest in water, particularly running water, is in no sense comparable to the ownership of a chattel or fast land.

The historical and philosophical basis for treating the

ownership of water differently from other elements was recognized by this Court in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 744-745, wherein it is stated:

> As long ago as the Institutes of Justinian, running waters, like the air and the sea, were res communes — things common to all and property of none. Such was the doctrine spread by civil law commentators and embodied in the Napoleonic Code and in Spanish law. This conception passed into the common law.

4. *The principles contained within Kaiser Aetna v. United States —— U.S. ——, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979) are not applicable to this case.*

It was assumed by this Court that Kuapa Pond was "fast land" under Hawaiian law. If it was "fast land" it would be deemed private and this Court stated that title to Kuapa Pond had actually vested in a particular person. Whether or not title to the Mulberry River had vested in petitioners is one basis for distinguishing the majority decision of the Arkansas Court from the dissent and it was properly a question of local law.

Had the Arkansas Court heretofore determined that the Mulberry River was a navigable river and subsequent thereto petitioners constructed a farm pond or lake on "fast land" with access to the Mulberry River, and a state agency ruled that the public had a legal right of access to the pond or lake, the taking question would have been in issue and *Kaiser Aetna* could serve as authority for a requirement of compensation.

5. *The United States Constitution does not protect an alleged common law right.*

A person has no property right or vested interest in any rule of common law as the Constitution does not forbid creation of new rights or abolition of old ones recognized by common law to attain permissible legislative objectives, despite the fact that otherwise settled expectations may be upset thereby. *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88.

This Court expanded the definition of navigability beyond the English criteria of the ebb and flow of the tide in *The Daniel Ball*, 77 U.S. 557 and there was no suggestion that it was unconstitutional. Are not the states free to fashion their common law in the same manner to protect and preserve the public interest of a state's citizens in the water resources of a state?

6. *It is not clear within the decision whether or not title to the Mulberry River stream bed has been retained in the state.*

The majority decision did specifically find that the Mulberry River was navigable with all incidental rights of that determination and the vast majority of Arkansas cases have held that on navigable streams title to the stream bed remains in the state. However within *Barboro v. Boyle*, on page 381, is the following statement from an earlier Arkansas case:

> Nor is it any objection to the public easement for navigation, that riparian proprietors of land, along fresh waters, own to the thread of the stream.

Perhaps the law was felt to be clear on this and the majority of justices deemed the language as to "incidental rights" sufficient to cover this point. But in any event if clarification is called for it should be made by the Arkansas Court as there are public policy questions which argue for and against retention of the stream bed in the state. Some states retain title to the stream beds of navigable waters; others do not. This Court should defer to the judgment of the individual states.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

That part of respondent Ozark Society's brief discussing navigability as a Point to be Relied Upon and the Argument relating to this point.

POINT TO BE RELIED UPON

I

THE COURT ERRED IN DETERMINING THAT THE MULBERRY RIVER IS A NONNAVIGABLE STREAM.

ARGUMENT

I

THE COURT ERRED IN DETERMINING THAT THE MULBERRY RIVER IS A NONNAVIGABLE STREAM.

Recently, the United States Supreme Court stated:

> As long ago as the Institutes of Justinian, running waters, like the air and the sea, were res communes — things common to all and property of none. Such was the doctrine spread by civil law commentators and embodied in the Napoleonic Code and in Spanish law. This conception passed into the common law.

United States v. Gerlach Live Stock Co., 339 U.S. 725, 744-745, 94 L.Ed. 1231, 70 Sup. Ct. 955 (1950).

In determining the extent of public rights in water the courts have historically been called upon to define navigability as a test of the public interest in waters.

Federal courts have been called upon to define navigability essentially for three purposes:

1. To determine the extent of admiralty jurisdiction;
2. To determine navigability within the context of the commerce clause of the U. S. Constitution;
3. To determine the ownership of a submerged bed.

Since *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845), it has been clear that rights in tidelands and in lands under navigable waters within state boundaries are governed by state rather than federal law. And in this respect each state as a function of its sovereignty has developed its own definition of navigability for purposes of determining which waters are jus privatum as opposed to jus publicum. For an excellent analysis of "navigability," note 1 Waters and Water Rights, Chapter 3, (R. Clerk ed. 1967) generally and pages 212-217 specifically.

Sheet 1-A within the Abstract to the property of the Plaintiffs, Ozark Society Exhibit "1", indicates that the Mulberry River was meandered when the property was surveyed in 1838. The Arkansas Supreme Court in *Lutesville Sand and Gravel Company v. McLaughlin,* 181 Ark. 574, 580, 26 SW2d 892 (1930), in citing 45 C.J. Navigable Waters, Sec. 15, stated:

> The running of a meander line along the bank of a stream does not establish its navigability, although it has been held that a body of water which has been meandered is prima facie navigable, but is not necessarily or conclusively so.

The landmark Minnesota case which has been cited by numerous state courts, including the Arkansas court,

Lamprey v. Metcalf, 52 Minn. 181, 53 NW 1139, 1143 (1893), contains the following statement:

> The division of waters into navigable and non-navigable is but a way of dividing them into public and private waters, — a classification which, in some form, every civilized nation has recognized; the line of division being largely determined by its conditions and habits. In early times, about the only use — except, perhaps, fishing, — to which the people of England had occasion to put public waters, and about the only use to which such waters were adapted, was navigation, and the only waters suited to that purpose were those in which the tide ebbed and flowed. Hence, the common law very naturally divided waters into navigable and nonnavigable, and made the ebb and flow of the tide the test of navigability. In this country, while still retaining the common law classification of navigable and nonnavigable, we have, in view of our changed conditions, rejected its test of navigability, and adopted in its place that of navigability in fact; and, while still adhering to navigability as the criterion whether waters are public or private, yet we have extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year. Most of the definitions of "navigability" in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be

> capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used — and as population increases, and towns and cities are built up in their vicinity, will be still more used — by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated.

In 1915, the Arkansas court in a decision relating to Horseshoe Lake in eastern Arkansas, cited *Lamprey v. Metcalf,* supra and in *Barboro v. Boyle,* 119 Ark. 377, 178 SW 378, upheld the right of the public to the use of the waters. The *Barboro* decision enlarged on the classical definition of navigability in a commercial sense which had been heretofore enunciated in *Little Rock, M. R. and T. Ry. v. Brooks,* 39 Ark. 403 (1882) and indicated that whether or not the waters of a lake are adapted to the purpose of navigation in a successful financial venture is not an *exclusive test* of the navigability of the lake. (Emphasis supplied)

The public trust that is imposed upon the state in its sovereign capacity ultimately rests with this court and that public trust is set forth in the following language contained within *Barboro*. The court in *Barboro* stated:

> It is the policy of this state to encourage the use of its water courses for *any* useful or beneficial purpose. There may be other public uses than the carrying on of commerce of pecuniary value. The culture of rice is being developed in this state and the waters of the lake could be used for the purpose of flooding the rice fields and for other agricultural purposes. As the population of the state increases the banks of the lake may become more thickly populated, and the water could be used for domestic purposes. Pleasure resorts might even be built upon the banks of the lake and the water might be needed for municipal purposes. Moreover, the waters of the lake might be used to a much greater extent — for boating, for pleasure, for bathing, fishing and hunting, than they are now used. (Emphasis supplied)

Admittedly, the only proof within this record as to navigability of a traditional commercial nature on the Mulberry River was the floating of logs on two occasions. (T. 302, 303) The traditional test of navigability was established at a time when the chief commercial value of waterways was in transporting produce to and from markets. The benefits to the public and immediate countryside in keeping major waterways open were obvious in those days.

The commercial value of the Mulberry River to the public and the immediate countryside are just as obvious

today. The Mulberry River and other major recreational streams in the Ozarks constitute one of the principal attractions for tourists and the economic well-being of many counties in north Arkansas is directly dependent on a flourishing tourist trade. (T. 425) Is not the use of the waters of the Mulberry in a way that fosters a one billion dollar a year industry in Arkansas (T. 425) both a useful and beneficial purpose that should be encouraged within both the letter and spirit of *Barboro*?

There is a clear duty on this court to protect the public interest in those waters of the state that constitute significant public water resources. This is not to say that every miniscule stream or small lake should be deemed a public water by this court. The true test, as enunciated in *Barboro*, should be the extent to which there is a substantial bona fide public interest, both present and prospective, with regard to the uses to which a body of water might be put.

The public nature of the Mulberry River based on the record of this case is manifest.

Thelma Smee, who was born in a house at the Low Water Bridge in 1905, testified as to extensive public use in the Davis Hole below the Low Water Bridge and up and down the river since the early 1900's. (T. 375) Curtis Childers, who had personally been on the Mulberry River a thousand times in his 66 years, testified as to common use of the Mulberry by his family and other families for generations without anyone having to get permission to use the river. (T. 417) Fasie Torix and his mother and father have picnicked on the Mulberry, camped on it and fished on it for the past 30 years. Mr. Torix would float maybe 10, maybe 15, 20, times a year and on none of the floats did he get permission from the landowners to float through

their property. He stated that he didn't feel that anybody owns the water — that they may own the land but they don't own the water. (T. 543) Jesse Jones, who owns property on the Mulberry east of Cass, testified that he didn't feel that he needs permission to float on the river. (T. 547) Gary Turner, whose father, Champ Turner, ran a canoe shuttle service through the late 1950's and into the 1960's, testified that he and his father had shuttled over 1,000 cars and that he did not feel that permission of landowners was needed to float through their property. (T. 575) Leslie Ellison, 45 years of age, testified that he had been fishing the Mulberry ever since he was big enought to fish. Up and down and in the vicinity of the Low Water Bridge. He fished without getting permission because he felt that he had the right to fish on the river. (T. 567) Don Rice, a carpenter from Altus, testified that he had floated and fished through the property in question three times a year since 1960 or 1961 and that he felt he did not need permission to do this. (T. 464)

The record indicates that the river became increasingly popular for canoeing and the President of the Ozark Society, James W. Wiggins, testified that the Ozark Society listed a scheduled float on the Mulberry River by a chapter of the Society every year from the summer of 1967 through the winter of 1977-78. (Note Exhibit "3" of Defendant Ozark Society as to the particulars.)

There was direct testimony as to the use of the river by individual canoeists, often with reference to notes or canoeing logs, and always with the understanding they were exercising a public right of floatage on the river:

Harry Crisson in April, 1965, with 15 to 20 people on the trip; April 1967, 1972 and 1973. (T. 385) Nancy Jack, 1964,

with about 20 people, and again in 1965 with about 19 people, and in 1967 with about 26 people. (T. 395) James Magness floated through the property in question in 1976, 1977 and 1978. (T. 442) Douglas Tims floated through the McIlroy property in April of 1972 and has floated about 30 times a year since then. (T. 494) Arthur Foy Evans first floated the Mulberry River through the McIlroy property in 1967 and has floated that section every year since then either once or twice except two years he was in the military service. (T. 498) Bob McCoy indicated that he had floated through the McIlroy property four or five times in the past eight years. (T. 510) Harold Hedges first floated through the McIlroy property in 1952 and again in 1964, 1965, 1967 and 1969. (T. 516) Leonard Heman initially floated the Mulberry in 1965 and again in 1967. On each float there were approximately ten to twenty people. (T. 526) Norman C. Preston first floated the Mulberry in 1964 with about 12 other people, and again in 1965 with 23 people. (T. 529) Roy Fuller first floated through the McIlroy property in 1967 and subsequently an additional nine times every following spring. (T. 533) Melvin Smith first floated through the McIlroy property in 1964; again in 1965 with 18 people; again in 1967 with a party of eight; in 1972; in 1973 with eleven other individuals; finally in 1975 with a group of perhaps 30. (T. 535) John Ewing, a local doctor, first floated through the McIlroy property in May of 1965 and an average of twice a year until five years ago when he moved to Ozark, and more frequently since then. (T. 539) Joseph Acuff started canoeing the Mulberry River in 1964 and his logs reveal a record of twelve trips spanning the years 1965 through 1976. (T. 569) David Thrasher first floated through the McIlroy property in 1970 and averaged two or three floats a year since then. (T. 597) Stewart

Noland first floated through the McIlroy property in the spring of 1971 and particularly every spring since then, with anywhere from two to a dozen people on each float. (T. 603)

Agencies of the state have recognized the intrinsic public nature of the Mulberry River and in reliance thereon have published literature in effect advertising the river to be a public water open to residents and non-residents alike. Richard Davis, Director of the Department of Parks & Tourism, testified that he considered the Mulberry River a public water. (T. 434) He indicated that the pamphlet, "The Float Streams of Arkansas," Intervenor State Exhibit No. "1", was published because of the increasing interest and the number of inquiries and demand the Department of Parks & Tourism had been receiving about fishing and floating. (T. 425) Mr. Davis pointed out that tourism was a billion dollar industry in Arkansas, the Number One industry in 16 north Arkansas counties, and that the two principal questions his Department received concerned water oriented recreation, *i.e.*, fishing and floating, in that order. (T. 426)

George Purvis, the Information Officer for the Arkansas Game and Fish Commission, testified in regard to the pamphlet, "The Float Streams of Arkansas," and stated that the Mulberry River was included since it was one of the streams in the state that was considered to have the most appeal to floaters and fishermen and was considered open to the public. Mr. Purvis classified the Mulberry as one of the top five or six recreational streams in the state. (T. 468) Mr. Purvis then identified Ozark Society Exhibit No. "6", *Arkansas Game and Fish Commission* Vol. 7, Issue 3, spring 1975, containing an article on and pictures of the

Mulberry River, within Pages 12 through 16. The large color photograph on Pages 12 and 13 was taken two and a half miles above the Low Water Bridge. (T. 519) Mr. Purvis also introduced another Game and Fish Commission publication, *Major Smallmouth Bass Streas of Arkansas*, Ozark Society Exhibit "7", which includes information on the Mulberry River.

William E. Keith, the Chief of Fisheries Division, State of Arkansas, pointed out as set forth within Defendant Ozark Society's Exhibit Number "8", Stockings of the Mulberry River 1952-77, that the Mulberry River had been stocked extensively commencing in 1952 and through 1977 and that in fact some of the stockings had taken place at the Low Water Bridge on the McIlroy property. (T. 486)

The stocking of fish was at public expense and in a sense these actions taken by the state without objection thereto by any party, including landowners along the Mulberry, were tantamount to an implicit dedication of these waters to public use.

In addition, Mr. Keith also referred to Defendant Ozark Society Exhibit No. "9", a stream survey which was conducted as part of an overall objective to locate, identify, describe and classify all the public waters within the state. (T. 488) Item 13 of the exhibit indicates that in 1952 the waters of the Mulberry River were being used for floating and commercial fishing; swimming, duck hunting and stock watering.

In addition to the official state recognition of the public nature of these waters, the U. S. Forest Service published a pamphlet, "The Mulberry River," Intervenor Exhibit No. "2", and within that pamphlet it is stated that the river's

scenic and recreational characteristics accented with its pristine waters has been appreciated locally and regionally from the period of early settlement.

Ed Harris, the District Ranger for the U. S. Forest Service, testified that he has seen people canoeing on the Mulberry at all times of the year, mostly March through May, and that in 1978 an estimated 160 canoes per weekend were being utilized on the Mulberry River. (T. 592)

Although there has been no formal declaration that waters of the Mulberry River are indeed public, it is clear from the record that there was a common understanding among all people and a custom and tradition that the waters of the Mulberry River were jus publicum. It is submitted that various state and federal pamphlets were published as a further manifestation of this, and that until Plaintiff, W. L. McIlroy, returned from California in 1971 (T. 258) no one seriously questioned the right of the public to use the waters of the Mulberry River.

As late as 1973 *Barboro v. Boyle,* supra, was cited in *Hays v. State,* 496 SW2d 372, 374, 254 Ark. 682, when this court reiterated that the financial success of a navigable venture was not an exclusive test of navigability.

In fact, in the landmark case dealing with the rights of riparian landowners to the use of adjacent waters, *Harris v. Brooks,* 283 SW2d 129, 134, 225 Ark. 445 (1955) the policy of the state enunciated in *Barboro* to encourage the use of its water courses for any useful or beneficial purposes was again cited in a footnote. Domestic use of water is superior to all other beneficial uses and by implication the use of water for fishing, swimming, recreation and irrigation are

on an equal basis and subject to the same protection as a use for navigation.

In 1942 *Barboro* was cited in *Anderson v. Reames*, 204 Ark. 216, 222, 161 SW2d 957, wherein the court quoted from a Wisconsin case, *Pewaukee v. Savoy*, 103 Wis. 271, 79 NW 436, 74 Am. St. Rep. 859, 50 L.R.A. 836, as follows:

> Upon the admission of the state into the Union the title to such lands, by operation of law, vested in it in trust to preserve to the people of the state forever the common rights of fishing and navigation and such other rights as are incident to public waters at common law, which trustee is inviolate, the state being powerless to change the situation by any way abdicating its trust.

In 1915 this court in *Barboro* upheld for all time the right of this generation and future generations to use the waters of Horseshoe Lake, a recognized major recreational resource in eastern Arkansas. The terrain along the Mulberry River is not the same, the waters are dissimilar in certain ways; however, the susceptibility of the waters of the Mulberry to the public use cited in *Barboro* are not dissimilar. This court is the ultimate repository of the public trust that attaches to public waters and unless this court is willing to overrule the principles enunciated in *Barboro*, the court can only find that the waters of the Mulberry are indeed public and therefore navigable.

The position of the Appellant, Ozark Society, is that the law as it has been enunciated by this court compels a finding of navigability. However, it is instructive to consider how the States of Oklahoma and Missouri, which along with Arkansas are blessed with the magnificent

streams that lace the Ozark-Ouachita region, have ruled on the navigability question.

In 1954, in *Elder v. Delcour,* 269 SW2d 17, the Missouri court declared that the Merimac River, an Ozark stream, was open to the public for both travel and passage, by floating and wading, for business or for pleasure. In 1969, the Oklahoma court in *Currie v. Hill,* 460 P.2d 933, 935, found that the Kiamichi River, a Ouachita stream, is one of the beautiful streams of southeastern Oklahoma; that it has for many years been known as one of the best fishing streams in the state and used by the public for fishing, recreation and pleasure, and held that the river is an open stream, navigable in fact and can be fished on from boats if the fisherman gets on the stream without trespassing against the will of the abutting owner. A comparison of the Mulberry to the Kiamichi was made by Bob McCoy, a witness from Oklahoma, who testified that he was familiar with both the Mulberry River and the Kiamichi River and that the rivers were very similar in size but that the Mulberry River carries a much larger volume of water than the Kiamichi. (T. 510, 513)

APPENDIX "B"

IN THE CHANCERY COURT OF
FRANKLIN COUNTY, ARKANSAS
OZARK DISTRICT

W. L. McILROY and JAMES DUNLAVEY as
Executor of the ESTATE OF GRADY R. McILROY,
As Tenants In Common ..... *Plaintiffs*

v. CASE NO. E-78-76

OZARK SOCIETY, WAYFARER
EXPEDITIONS, INC. and
THE WILDERNESS CO. ..... *Defendants*

PETITION FOR DECLARATORY JUDGMENT

Come now the plaintiffs, W. L. McIlroy and the Estate of Grady R. McIlroy, and for their Petition for Declaratory Judgment herein against the defendants, state and allege:

I.

That W. L. McIlroy is a citizen and resident of the Ozark District of Franklin County, Arkansas, and owns property as tenants in common with the Estate of Grady R. McIlroy, his deceased brother which shall be fully described herein. James Dunlavey is the lawful and acting Executor of the Estate of Grady McIlroy, having been appointed by order of the Probate Court of Franklin County, Ozark District, Docket No. P-77-13.

II.

The Defendant, Ozark Society, is an unincorporated association of outdoor enthusiasts and canoeists who have published a pamphlet called "The Mighty Mulberry"

publicizing the Mulberry Creek or River near the Cass community of Franklin County, as public property and which has caused the property owned by the plaintiffs to be commercialized and invaded by trespassers. In addition, the association also publishes to its members, "The Quarterly Ozark Society Bulletin", edited by Joe and Maxine Clark. Dr. Neil Compton of Bentonville, Arkansas, is the President of the Ozark Society and as such is authorized to accept service of process herein. The defendant, Wayfarer's Expeditions, Inc. is a Missouri Corporation, not authorized to do business in the State of Arkansas, but which operates a canoe rental business on the Mulberry Creek or River and the persons to whom they rent their canoes are constantly trespassing on plaintiff's porperty. Their agent for service of process in the State of Missouri is Walter E. Thomas, 1346 East Loren, Springfield, Missouri, and they are subject to service of process by virtue of the Arkansas Long Arm Statute. The defendant, The Wilderness Co., is also engaged in the Canoe Rental Business on the Mulberry but plaintiff is unable to determine the exact nature of their business organization or their agent for service of process.

III.

The plaintiffs own the following described property in the Ozark District of Franklin County, Arkansas, to-wit:

TRACT NO. 1: The North Half of the Northeast Quarter of Section 28, Township 12 North, Range 26 West, 80 acres; The Southeast Quarter of the Northeast Quarter of Section 28, Township 12 North, Range 26 West, 40 acres; The East Fourth of the Southwest Quarter of the Northeast Quarter of Section 28, Township 12 North, Range 26 West, 10 acres; The Northwest

Quarter of the Northwest Quarter of Section 27, Township 12 North, Range 26 West, 40 acres; The Southwest Quarter of the Northwest Quarter of Section 27, Township 12 North, Range 26 West, 40 acres; Part of the Southwest Quarter of the Southwest Quarter of Section 22, Township 12 North, Range 26 West, 10 acres; Part of the Southeast Quarter of the Southeast Quarter of Section 21, Township 12 North, Range 26 West, 10 acres, containing in all 230 acres, more or less.

TRACT NO. 2: Part of the South Half of the Southwest Quarter of Section 24, AND Part of the Northwest Quarter of Section 25, in Township 12 North, Range 27 West, more particularly described as beginning at the Southwest Corner of said Section 24, running thence South 7.4 chains to a dry branch, thence with the meanderings of said branch to the South side of the Northwest Quarter of the Northwest Quarter of said Section, thence East to the Southeast Corner of said Northwest Quarter of the Northwest Quarter, thence East 15.06 chains, thence North 31 1/2 degrees West 29.94 chains, thence North 19.43 chains, thence South 5.52 chains to the place of beginning. ALSO 2.66 acres in the Northeast Corner of the Southwest Quarter of the Northwest Quarter of said Section 25, hereby conveying 62 & 2/10 acres, more or less. Tract No. 2 conveys all that part of what was formerly known as the A. H. Sadler farm which was owned by the heirs of Miles Childers.

IV.

At certain times of the year, the Mulberry Creek or River will be at high water, and due to the efforts of the

Ozark Society, and Wayfarer Expeditions, Inc., the Mulberry has been widely publicized, principally by the publication and distribution of a pamphlet called "The Mighty Mulberry" by the Ozark Society, and the outdoor enthusiasts and canoeists travel considerable distances to reach the Mulberry. During the spring season it is not uncommon for at least six hundred people per weekend to pass over the McIlroy land. These people litter and their behavior is so offensive that Plaintiffs are denied the peaceful enjoyment of their property. Up until about the last three years, the Mulberry was not publicized, and there were very few people canoeing on the stream. Due to the joint efforts of the Ozark Society and Wayfarer Expeditions, Inc., the Mulberry has now been commercialized and publicized as public property and people from as far away as Texas, Kansas, Missouri, Louisiana and Michigan come to the Mulberry for purposes of floating and canoeing. For instance, attached hereto as Exhibit "A" is the front and back of a Wayfarer's Expeditions, Inc. map and pamphlet which states "The Mulberry River is a perfect setting for canoeing, hiking and back packing trips in the Ozark National Forest." It makes no mention of privately owned land, and a high percentage of the land on the Mulberry is privately owned. Further, the members of the Ozark Society, and the principals of the Wayfarer Expeditions, Inc. publically state that the Mulberry is a public property because it is a navigable stream and they have the absolute right to float the stream, without regard to the wishes of the landowners. The Plaintiffs on the other hand maintain that the stream is nonnavigable and that anyone floating the stream where they own property on both sides of the stream is trespassing.

V.

Most often, any canoeist who is stopped by Plaintiff or their agents will display a map furnished by either the Ozark Society or the Wayfarer's Expeditions, Inc. and argue vehemently that he or she is not on private property by virtue of the misleading map which had been provided by the Defendants. The Defendants and their agents, servants or members should be permanently restrained and enjoined from continuing to distribute any map, publication, or advertisement of any form which does not reflect or state, that with the exception of that part of the Mulberry which flows through the Ozark National Forest, is private property and anyone floating the stream outside of the boundary of the Ozark National Forest is trespassing.

VI.

The Plaintiff, W. L. McIlroy, has incurred substantial theft and burglary losses in excess of $17,000.00 Dollars over the past three years and approximately ten to twelve head of his cattle since 1971 have been stolen or shot. It is no longer possible for him to obtain burglary or theft insurance, and his previous coverage in this regard has been cancelled. The Plaintiff, W. L. McIlroy, has repeatedly requested that the Deputy Prosecuting Attorney of Franklin County, Arkansas, Gregory McKenzie, as well as the Sheriff of Franklin County, Bob Pritchard, proceed to issue trespass citations to any person who may trespass upon his property. The Sheriff and Deputy Prosecuting Attorney have advised Plaintiffs that until the issue of navigability of the Mulberry is determined by a competent court of jurisdiction, they will not prosecute anyone canoeing through their property.

VII.

At the point where the Mulberry crosses the McIlroy property, the stream is nonnavigable. The McIlroy's own property adjacent to the Mulberry, and at certain places they own both sides of the property adjacent to the Mulberry. As the owners of the land bordering the Mulberry, which is a nonnavigable stream, they own the bed of the stream as well as the water. The Defendants, and their agents contend that the Mulberry is navigable as it crosses the McIlroy property, and the ownership of the bed and the uses of the water are therefore vested in the public. Attached hereto as Exhibit "B" and "C" are copies of publications of the U. S. Corps of Engineers and Arkansas Game and Fish Commission describing what they consider as navigable streams in the State of Arkansas. The Corps of Engineers considers the Mulberry navigable up to the town of Mulberry, Arkansas, which is approximately twenty to twenty-five miles below from plaintiff's property. While this is not conclusive evidence, it is some evidence to be considered by the Court.

WHEREFORE, the Plaintiffs pray that this Court enter its declaratory judgment declaring that the Mulberry Creek or River is nonnavigable at points where it crosses the Plaintiffs' properties, and that this Court issue its permanent restraining order against the Defendants, the Ozark Society, and Wayfarer Expeditions, Inc., and the Wilderness Company, and their agents, employees or members from broadcasting radio and television advertisements and from publishing any booklets, maps or other publications which are misleading as to the ownership of the Mulberry, and which would fail to advise all parties that the Mulberry, with exception of a small portion in the

Ozark National Forest, is privately owned property and not open for public use, and further that the defendants, their agents and members be permanently restrained from floating or canoeing on the Mulberry where it crosses the Plaintiffs' property. Further, that the Deputy Prosecuting Attorney, and Sheriff be directed to assist the Plaintiffs in removing from their property trespassers, who may attempt to canoe across the Plaintiffs' property, and for all other relief to which the Plaintiffs may be required, whether specifically prayed or not.

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P.O. Drawer 968
Fort Smith, Arkansas 72901

By: /s/ Ronald W. Metcalf

IN THE CHANCERY COURT OF
FRANKLIN COUNTY, ARKANSAS
OZARK DISTRICT

W. L. McILROY, AND JAMES DUNLAVEY,
As Executor of the Estate of
GRADY R. McILROY, deceased ..... *Plaintiffs*

vs. CASE NO. E-78-76

OZARK SOCIETY, WAYFARER
EXPEDITIONS, INC., THE WILDERNESS
COMPANY and THE STATE OF
ARKANSAS ..... *Defendants*

REPLY TO COUNTERCLAIM

Come now the Plaintiffs and Counter-Defendants, and

for their Reply to the Counterclaim of the State of Arkansas, state and allege:

I.

They deny generally and specifically, the allegations of the counterclaim, but do admit that W. L. McIlroy has continuously and persistently attempted to stop trespassers from crossing the property in question, without permission has been granted previously.

II.

The Plaintiffs and Counter-Defendants specifically deny that the public has acquired a prescriptive right-of-way easement across the property in question.

WHEREFORE, having fully answered, the Plaintiffs and Counter-Defendants pray that Counterclaim be dismissed, and to all other relief to which they are entitled, whether specifically prayed or not.

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P.O. Drawer 968
Fort Smith, Arkansas 72901

By: /s/ Ronald W. Metcalf

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EXPEDITIONS, INC., THE WILDERNESS
COMPANY and THE STATE OF
ARKANSAS ..... *Defendants*

REPLY TO COUNTERCLAIM

Come now the Plaintiffs and Counter-Defendants, and for their Reply to the Counterclaim of Ozark Society, state and allege:

I.

They deny generally and specifically, the allegations of the counterclaim, but do admit that W. L. McIlroy has continuously and persistently attempted to stop trespassers from crossing the property in question, without permission has been granted previously.

II.

The Plaintiffs and Counter-Defendants specifically deny that the public has acquired a prescriptive right-of-way easement across the property in question.

WHEREUPON, having fully answered, the Plaintiffs and Counter-Defendants pray that the Counterclaim be dis-

missed, and to all other relief to which they are entitled, whether specifically prayed or not.

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P.O. Drawer 968
Fort Smith, Arkansas 72901

By: /s/ Ronald W. Metcalf

IN THE CHANCERY COURT OF
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W. L. McILROY and JAMES DUNLAVEY as Executor of the ESTATE OF GRADY R. McILROY, as Tenants in Common ..... *Plaintiffs*

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OZARK SOCIETY, WAYFARER EXPEDITIONS, INC. and THE WILDERNESS COMPANY ..... *Defendants*

and

THE STATE OF ARKANSAS ..... *Intervenor*

REPLY TO COUNTERCLAIM

Come now the Plaintiffs and Counter-Defendants, and for their Reply to the Counterclaim of Wayfarer Expeditions, Inc., state and allege:

I.

They deny generally and specifically, the allegations of the counterclaim, but do admit that W. L. McIlroy has

continuously and persistently attempted to stop trespassers from crossing the property in question, without permission has been granted previously.

II.

The Plaintiffs and Counter-Defendants specifically deny that the public has acquired a prescriptive right-of-way easement across the property in question.

WHEREFORE, having fully answered, the Plaintiffs and Counter-Defendants pray that the Counterclaim be dismissed, and to all other relief to which they are entitled, whether specifically prayed or not.

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